(3)

Supreme Court, U.S.
FILED
JUN 12 1992
OFFICE OF THE CLERK

No. 91-1809

IN THE

Supreme Court of the United States

October Term, 1991

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. de la RIGAUDIERE,
and DAVID C. SMITH,
Petitioners

v.

FORD MOTOR COMPANY,
FORD MOTOR CREDIT COMPANY,
and WENNER FORD TRACTOR, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

ARNOLD R. GINSBURG
500 College Avenue
Haverford, Pennsylvania 19041
(215) 649-2929
Attorney and Counsel of Record for Petitioners

June 12, 1992

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

Respondents' last-minute waiver of their right to respond to our Petition for Writ of Certiorari "unless requested to do so by the Court" is a new and unexpected development which requires special comment by petitioners in this Supplemental Brief.

Petitioners Tunis Brothers Company, Inc., *et al.* filed and served their Petition for Writ of Certiorari on May 11, 1992. Under this Court's Rule 15.2, respondents had until June 10, 1992 to file their Brief in Opposition.

By letter to the Clerk of the Court, dated June 8, 1992 and mailed by Federal Express, the attorney for respondents Ford Motor Company and Ford Motor Credit Company stated: "Respondents believe the petition to be meritless and, therefore, waive the right to respond to it unless requested to do so by the Court. I understand that it is the Court's practice not to grant a petition without first requesting respondents to submit a brief in opposition. I trust therefore that the Court will contact me if they wish respondents to submit a brief." In an almost identical letter, dated June 9, 1992 and mailed "via UPS overnight", the attorney for respondent Wenner Ford Tractor, Inc. informed the Court that Wenner Ford "believes that the Petition is without merit and, therefore, waives its right to respond to the Petition unless instructed to do so by the Court."

By engaging in such certiorari brinkmanship, which invites adverse consequences for respondents, their unwillingness to file a brief in opposition to our Petition unless "requested" or "instructed" to do so by the Court is neither courteous nor helpful to the Court and its law clerks. Even more seriously, respondents' unwillingness and waiver constitute a flagrant disregard of this Court's comparatively new Rule 15.1, effective January 1, 1990, stating:

> A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting

> the Court in the exercise of its discretionary jurisdiction. In addition to other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition.

In R. Stern, E. Gressman & S. Shapiro, *Supreme Court Rules: The 1990 Revisions* 15 (1990), the authors of *Supreme Court Practice* (6th ed. 1986) state in part: "Rule 15, which replaces former Rule 22, governs the brief in opposition to certiorari, as well as reply briefs and supplemental briefs. There are no significant changes in the procedure for filing such briefs. But there is one *significant piece of advice* given to counsel for a respondent, advice which is contained in Rule 15.1 and *has no past counterpart*: [Rule 15.1 quoted]. This new provision or admonishment codifies the practice announced by the Court in *Oklahoma City v. Tuttle*, 471 U. S. 808, 815-16 (1985). Counsel for all parties, but especially counsel for the respondent, should read and absorb the lesson taught by that decision. That lesson was reiterated more recently in *Canton v. Harris*, 109 S. Ct. 1197, 1202-1203, 57 U.S.L.W. 4270, 4272 (1989)." (Emphasis added.)

In view of the Court's current Rule 15.1 it is very doubtful whether respondents can safely rely upon what

they refer to as "the Court's practice not to grant a petition [for certiorari] without first requesting respondents to submit a brief in opposition". Since such an alleged practice will encourage respondents to refrain from filing briefs in opposition unless and until the Court expressly requests or instructs respondents to file in specific cases, and since such a practice would defeat the purpose and intent of Rule 15.1, it is respectfully submitted that such a practice should be discontinued if, in fact, it does exist. As Rule 15.1 emphasizes: **"A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting the Court in the exercise of its discretionary jurisdiction . . . Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later."**

Rule 44.3 provides that "No response to a petition *for rehearing* will be received unless requested by the Court, but no petition will be granted without an opportunity to submit a response." If the Court wanted respondents to waive their right to file briefs in opposition to certiorari petitions unless and until the Court requested otherwise, it would have so provided in Rule 15. This it did not do. Indeed, Rule 15.1 emphasizes the "important purpose" of a brief in opposition.

In fact, Rule 15.1 is not only a "request" but an "instruction" by the Court to respondents that they should file a brief in opposition to our Petition within the time specified by Rule 15.2. For respondents to ignore this "request" and "instruction" and to waive the right to respond to the Petition "unless requested [or "instructed"] to do so by the Court" — to "trust . . . that the Court will contact [respondents' counsel] if they wish respondents to submit a brief" — is nothing less than brazen effrontery.

Is it possible that respondents *really* believe that our Petition for Writ of Certiorari is "meritless" or "without merit" as their letter waivers state? The very important "Questions Presented" by the Petition in light of the

facts presented therein are clearly certworthy. This antitrust and fraud case has been in litigation since 1982, has been the subject of review by the Third Circuit three times, and has been before this Court twice before on *respondents'* petitions for certiorari. Beyond that, our Petition speaks for itself.

And if respondents *really* believe that our Petition is "meritless" or "without merit", why did they wait until the 29th and 30th days before so informing the Court and waiving their right to file a brief or briefs in opposition?

Is it not more likely that respondents have discovered no valid reasons for opposing certiorari and therefore prefer to remain silent? Do respondents find it impossible to defend the very confused opinion and erroneous decision of the Third Circuit? Do respondents fear that any brief in opposition filed by them would only provide petitioners with the opportunity to file a very strong Reply Brief?

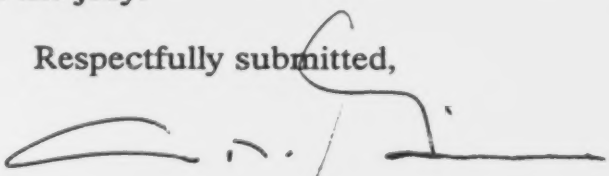
Is it possible that respondents filed their letter waivers at the last minute because they were not satisfied with the brief or briefs in opposition upon which they have been working and, in an effort to buy more time to strengthen their arguments, they elected to waive their right to file briefs in opposition now in reliance upon what they understand to be "the Court's practice not to grant a petition without first requesting respondents to submit a brief in opposition"?

Since respondents have, in effect, pleaded a civil kind of *nolo contendere* by waiving their right to file a brief in opposition, and in view of Rule 15.1, respondents have conceded that they perceive no "misstatements of fact or law set forth in [our certiorari] Petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted". By their waiver, respondents have also conceded that there are no other misstatements of fact or law in our Petition.

CONCLUSION

For the reasons stated in our Petition for Writ of Certiorari and herein, petitioners respectfully submit that the Court should grant this Petition, without *further* requesting or instructing respondents to submit a brief in opposition, so that the Court may, without further delay, consider the questions presented, correct the errors of the court below in the interest of justice, affirm the district court's decision in all respects, and help safeguard the constitutional guarantee of trial by jury against judicial erosion through interference with the proper function of the jury.

Respectfully submitted,



ARNOLD R. GINSBURG
500 College Avenue
Haverford, Pennsylvania 19041
(215) 649-2929

Attorney and Counsel of Record for Petitioners

June 12, 1992